ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CS Docket No. 98-147

REPLY COMMENTS OF RCN TELECOM SERVICES, INC.

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SUMMARY

RCN provides local exchange, long distance, Internet, and video services primarily to the residential market in the Boston to Washington, D.C. corridor. In its initial comments in this proceeding RCN expressed caution about the Commission's plan to permit ILECs to provide advanced telecommunications capability ("ATC") through affiliated entities. RCN also proposed certain safeguards in addition to those proposed by the Commission, the adoption of national collocation standards, and expansion of the existing local loop unbundling rules. RCN also proposed that dark fiber should be considered an unbundled network element, that advanced services must be offered for resale at a wholesale rate discount, and that existing LATA boundaries not be modified prior to ILEC compliance with § 271 of the Act.

Among the 90-plus comments filed in this docket, the ILECS have almost uniformly rejected the Commission's proposal. Instead, they have taken positions which can only be described as disappointingly reactionary, looking back to the era in which they were incumbent monopolists, and insisting that the terms and conditions proposed by the Commission for their provision of ATC are unnecessary, impractical, or too expensive. The future lies with ATC. Existing distinctions based on decades-old technology (or, in the case of the PSTN, more than one hundred years of technology), should be viewed as transitional. To get to the future, however, very close regulation of the ILECs is required.

The comments filed by the ILECs in this proceeding are ample proof that they are not yet ready to function without using their legacy monopolistic powers to minimize competition. Most incredibly, they have in effect contended that if required to provide ATC under the terms and

conditions proposed by the Commission they would not do so, or would do so only slowly or incompletely. Because there is a general consensus that ATC will be an increasingly important component of the telecom industry, and because it is unlikely that any significant industry player can survive, let alone prosper, without participating in ATC, these positions are simply impossible to believe. The unreality of these comments is perhaps best summarized by the observation of BellSouth that no entity currently has a bottleneck on the last mile in the provision of ATC. If that is so, RCN must have been wrestling with ghosts in its never-ending battles to secure access to local exchange facilities.

Indeed, RCN finds these views so surprising that it has modified its former position in this docket to suggest that ILECs be barred from the retail provision of ATC altogether. If the ILECs' stockholders wish to participate in the provision of ATC, they should do it by persuading ILEC management to transfer appropriate assets to a new entity which will be wholly independent of the ILEC and to spinout to its existing stockholders shares in the new entity. Management, officers, and directors should be wholly independent of the ILEC. In this fashion, the Commission and the CLECs can be assured that the provision of ATC will be free of the overwhelming bottleneck power currently held by the ILECs. RCN further recommends that ILECs be free to tariff for wholesale use facilities and services which are necessary to the provision of ATC by CLECs. This divestiture proposal should be fully explored in a further notice of proposed rulemaking. The Commission has all the authority it needs to restructure the

provision of ATC by the ILECs in this manner. However, a further notice would provide the ILECs and the public ample opportunity to address the proposal.

If the Commission is determined to further pursue its own proposal, it should adopt the further steps suggested by RCN in its initial comments, especially with respect to collocation, dark fiber and other UNEs.

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RCN Telecom Services, Inc. ("RCN"), by the undersigned counsel, herewith respectfully files its reply comments in the above-captioned proceeding. RCN, which provides telephone, Internet and video services to residential subscribers in the Northeast, filed initial comments in this proceeding. After reviewing the voluminous initial comments filed by other interested parties, RCN files these brief reply comments.

I. Introduction

In its own initial comments RCN expressed the need for caution in permitting ILECs to establish separate subsidiaries that could be exempted from the requirements of sections 251 and 271 of the Telecommunications Act of 1996.[1] RCN proposed certain safeguards in addition to those proposed by the Commission, the adoption of national collocation standards, and expansion of the existing local loop unbundling rules. RCN also proposed that dark fiber should be considered an unbundled network element, that advanced services must be offered for resale

[1] 47 U.S.C. §§ 251, 271.

at a wholesale rate discount, and that existing LATA boundaries not be modified prior to ILEC compliance with § 271 of the Act. Like many other commenters in this docket, RCN is today and for the foreseeable future will remain dependent to a substantial degree on "last mile" facilities provided by the ILECs. The importance of access to unbundled local loops, other UNEs, including switching, pair gain facilities, and dark fiber cannot be overstated. Similarly, fair and reasonable terms for access to collocation facilities is absolutely vital for the full rollout of RCN's competitive services. Both the FCC and relevant state PUCs must remain active, vigilant and aggressive in securing such facilities and access for RCN.[2]

The deployment of ATC is dependent to a high degree on the presence of circumstances which do not exist today, i.e., reliable, predictable and uniform access to bottleneck last mile facilities. The collocation problem is serious, pervasive, and a significant barrier to deployment of ATC. RCN has devoted significant resources to never-ending problems gaining access to the last mile, adequate collocation arrangements, and similar issues. ILEC assurances that these problems have been solved or do not require more activist regulatory intervention are simply wrong.

Over 90 initial comments were filed by ILECs, CLECs, IXCs, equipment manufacturers, and federal and state government entities. RCN has carefully reviewed these filings and has concluded that its policy recommendations must be modified to include even more constraints on

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[2]*See* Comments of RCN Telecom Services, Inc., especially at pp. 12-20.

the provision of advanced telecommunications capability ("ATC") by ILECs than RCN had initially proposed. In light of the astonishingly unrealistic positions advocated by the ILECs it is clear that their mindset remains deeply rooted in the long gone era of monopolistic incumbency. RCN accordingly recommends that the Commission initiate a further notice to seek comment on the requirement that ILECs may provide ATC only by spinning out ATC related assets to a fully divested entity.

II. Reply Comments

A. The ILEC Comments

The Comments filed by the ILECs are so prototypically incumbent/monopolist in tone that the reader is compelled to wonder what, if anything, has changed since passage of the Telecommunications Act of 1996.[3] According to the entrenched ILEC industry no firm monopolizes or is likely to dominate the last mile in the provision of advanced telecommunications services.[4] The costs of creating separate subsidiaries will be prohibitive with the result that the offering of ATC by the ILECs will be substantially inhibited or delayed, or reduced in scope. Fully implementing an affiliate could take 12 to 24 months and cost hundreds

[3] P.L. 104-104, codified at 47 U.S.C. sec. 151 *et seq.*

[4] BellSouth at 10-11; NRTA at 4. (Unless specified otherwise, all footnote references are to initial comments filed in this docket.)

of millions of dollars.[5] Separate subsidiaries are anti-competitive and delay service deployment.[6] It is suggested that the proposed sec. 271 structure for an advanced telecommunications services affiliate would have too many inefficiencies, restrictions and unknowns to provide an expected return commensurate with the risks of deploying the significant investment associated with ATC.[7] In this vein the Commission should go no further than its *Competitive Carrier* rules.[8] GTE believes that the FCC may impose the requirement of separate officers, directors, and employees as long as the two entities may interact via established wholesale channels like any other unaffiliated carriers.[9] According to the ILECs there is no reason to prohibit an incumbent carrier from performing operations, installations, and maintenance for an affiliated separate subsidiary. Without the ability to obtain operations, installations, and maintenance from the ILEC, the affiliate is not a viable option, particularly for broad scale deployment to the mass market.[10] Bell Atlantic believes there is no reason to restrict the transfer of information from the incumbent to an affiliated separate subsidiary, nor to restrict the transfer of customers from an incumbent to an

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[5] E.g. Bell Atlantic at 23; BellSouth at 13; CBT Comments at 4-8; GTE at 38; USTA at 4; U S West at 17-18.

[6] Bell Atlantic at 23.

[7] SBC at 2; Kiesling Consulting, LLC ("Kiesling") at 5-6.

[8] BellSouth at 41; U S West at 27; SBC at10-11.

[9] GTE at 40.

[10] Ameritech at 56; Bell Atlantic at 30; CBT at 9; GTE at 35, 40; SBC at 10.

affiliated separate subsidiary, or to prohibit joint marketing.[11] Both entities should be allowed to use the same brand name and trademarks; affiliates should have access to parents' capital.[12]

The ILECs are unanimous that Congress did not establish a collocation requirement opening their central offices to anyone who wants to locate any type of equipment in those offices.[13] Collocation matters should be discussed and resolved on a case-by-case basis.[14] The ILECs are also unanimous that the Commission should not require them to compile comprehensive information about local loop conditions or the ability of a particular loop to handle DSL service; doing so could take years and an enormous amount of resources.[15] The ILECs insist that unbundling and resale obligations imposed on the traditional telecommunications services significantly undermine the incentives of incumbent carriers to make the enormous investments necessary to deploy ATC. If their competitors can piggyback on their investment, the ILECs' incentive to invest is substantially reduced.[16] On the other hand,

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[11] Bell Atlantic at 29-31; CBT at 10; GTE at 28; SBC at 6, 9.

[12] Bell Atlantic at 31-32; CBT at 17; GTE at 44-6.

[13] Ameritech at 39; Bell Atlantic at 38-9; CBT at 20-21; GTE at 61-2; SBC at 15-16; U S West at 36-38.

[14] BellSouth at 47; CBTat 22; GTE at 74; SBC at 20.

[15] Ameritech at 16; Bell South at 48; GTE at 82-3; SBC at 31; U S West at 44.

[16] Bell Atlantic at 20; CBT at 42-44; GTE at 106; U S West at 9.

mandating CLEC access to such expensive plant at cost, without CLECs having to risk their own capital, inefficiently discourages CLECs from investing in their own facilities.[17]

RCN recounts this litany of ILEC positions because nothing could more dramatically illustrate the need for continuing close regulatory control of the ILECS. The ILECs' comments repeat the same worn out excuses and improbable threats that regulators, judges and legislatures have been hearing from the ILECs, and before them from the integrated Bell System, for decades. One would think they would be embarrassed to parade yet again these views which are reactionary and anachronistic. Other than the ILECs and their apologists there cannot be many entities involved in telecommunications regulation who can treat these positions seriously. RCN surely does not. The idea that separated subsidiaries for the provision of ATC, with a cost, personnel, and operational wall between the ILECs and their ATC subsidiaries, will compel the ILECs to abandon the burgeoning world of ATC, or even to sharply curtain their participation in that important segment of future markets, is simply not credible. If these views were only unpersuasive, they would not merit close attention. But they are more than unpersuasive; they reveal a frame of mind which is wholly incompatible with a good faith effort to migrate into a world of competition. It is no wonder not a single RBOC has won FCC approval for in-region interLATA competition. On the contrary, these entities are plainly not ready to compete under the terms ordained by Congress in the 1996 Act. If the ILECs believe that the Commission's

[17] U S West at 10.

proposal – which RCN thinks is too deregulatory – is not commercially feasible, the Commission should call their bluff. It is not likely that, in light of the generally recognized movement toward IP and away from circuit switching, the ILECs will simply choose not to participate in ATC.[18] To the extent they do not CLECs, provided they have full and fair access to bottleneck elements of local exchange plant, will meet the demand.

B. Other Commenters

Not surprisingly, there is a far broader spectrum of views among the CLECs and other commenters. RCN will not burden this filing with an extended discussion of those matters but instead will concentrate its attention on an issue which RCN believes lies at the core of fair competitive opportunities: the relationship between the ILEC and its ATC subsidiary. As noted above, RCN has already expressed in its initial comments a preference for a substantial degree of separation. In brief, RCN believes that the ATC subsidiary must not be a successor or assign, that no network equipment should be transferred, that prior Commission approval should be required for the creation of an ATC affiliate and that the Commission should preempt conflicting state standards.[19]

In its NPRM the Commission proposes certain limitations on the creation of an ATC affiliate by the ILECs, and related reporting obligations. See NPRM at ¶¶ 88 to 115. AT&T

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[18] It is striking that the ILECs, who claim they cannot offer ATC on a commercial basis without all these advantages, nevertheless assure the Commission that CLECs, who have few, if any of these advantages, can be counted upon to become fully competitive in ATC.

[19] RCN at 4-12.

suggests an ownership requirement that mandates a sizable investment from an outside company.[20] Numerous CLECs support at least partial public ownership.[21] Tandy Corporation also supports separate officers, directors and employees.[22] TRA proposes separate public ownership of the affiliate, coupled with independent officers, directors and managers so as to require SEC reporting obligations and create fiduciary duties to independent stockholders.[23] Level 3 suggests divestiture so that the ILEC and the ATC subsidiary have no common ties whatsoever.[24]

C. The Need for Full Divestiture

RCN believes that the expertise and the resources which are to be found in the RBOCs and GTE should be applied to the deployment of ATC. However, in view of the potential for unfair competition if such resources are devoted to ATC on the bases espoused by the ILECs, in particular the wholly unrealistic and anachronistic views espoused by them in initial comments, RCN has concluded that full divestiture is absolutely essential to protect the public interest in the development of competitive ATC markets. While there are complexities associated with a full divestiture, they are probably less challenging than the almost infinite variety of rules and

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[20] AT&T at 20.

[21] Westel at 6; Qwest at 44; ICG at 10.

[22] Tandy at 6.

[23] TRA at 31-2.

[24] Level 3 at 5.

policies which the Commission and state commissions would have to develop to regulate the partial separations which are inherent in the NPRM's or similar proposals for separate affiliates. Complete divestiture at least has the virtue of being a clear line and the inevitable questions of detail which arise can be addressed by reference to a simple, understandable standard: no overlapping interests of any sort.

What RCN thus recommends is the adoption of a requirement that ILECs must fully divest themselves of any ownership or other interest in a retail ATC offering. The ILEC should be barred altogether from the retail provision of ATC but allowed to spin out, presumably to its stockholders, a new entity which can engage in the provision of ATC. If the ILEC's stockholders wish to participate in the ATC segment of the market, they must do so by holding equity in the new fully separated entity. The assets of the ILEC which are to be assigned to the new entity and devoted by it to the ATC will have to be appraised by an outside expert. Personnel moving to the new entity will have to sever their ties to the ILEC. The officers and directors should have no prior association with the ILEC and must agree not to accept employment at the ILEC for a minimum period of perhaps five years after the divestiture. In this fashion one can be certain that the incentives of the new entity will be the same as those of any other CLEC. On the other side of the divestiture, the ILEC will be barred from participating in the provision of ATC to the public or on a wholesale basis to any segment of the public, although it should retain the obligation to lease facilities such as UNEs or dark fiber to ATC providers under tariff

arrangements which assure that the same facilities are available to all ATC competitors on a nondiscriminatory basis.

There is ample authority and precedent for the proposition that the Commission may compel incumbent carriers to restructure provided that the order to do so is based on a record which reasonably supports the Commission's conclusion and that the restructuring does not involve an unconstitutional or otherwise impermissible taking.[25] The Commission has ordered restructuring in the telephone industry on numerous occasions.[26] Perhaps the best known is the Commission's decision in *Computer II*.[27] Administrative agencies have broad powers to address

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[25] While the valuation of the assets to be transferred to the newly-created ATC entity will be subject to review by a variety of regulators including the FCC, DOJ and SEC, the judgment of their worth will be essentially a marketplace function, assuring that the ILEC is not unlawfully deprived of its property.

[26] *See e.g., Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Market Energy and Regulation of Foreign-Affiliated Entities,* Report and Order and Order on Reconsideration, IB Docket Nos. 97-142, 95-22, FCC 97-398, at paras. 253-55 (rel. Nov. 26, 1997) ("*Foreign Carrier Protection Order*") (discussing various instances in which the FCC has imposed structural separation requirements on common carriers, and imposing structural separation requirements on U.S. international carriers and their foreign carrier affiliates that possess market power); *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services,* Report and Order, 11 FCC Rcd 18564, 18579, paras. 29, 30 (1996) ("*BOC Out-of-Region Provision Order*") (offering RBOCs the choice of providing out-of-region, interstate, interexchange services under non-dominant regulation if the RBOCs offer those services through a separate affiliate meeting certain separation requirements, and rejecting arguments that Section 272(a)(2) prohibits the FCC from doing so).

[27] In re *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* 77 F.C.C. 2d 384 (1980) *(Computer II);* Report and Order, In re *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies,* 95 F.C.C. 2d 1117 (1983), *aff'd sub nom. Illinois Bell Tel. Co. v. FCC,* 740 F.2d 465 (7th Cir. 1984).

problems lying within their purview; in such cases "Congress must have intended to give [the agency] authority that was ample to deal with the evil at hand." *Pan Am World Airways, Inc. v. United States,* 371 U.S. 296, 312 (1963). As the Court in *Pan Am* noted, "authority to mold administrative decrees is indeed like the authority of courts to frame injunctive decrees.... Likewise, the power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority... ." *Id.*, 312 at n.17. The Communications Act gives the Commission very broad powers to regulate the dynamic communications industry. Sections 4(i) and 4(j), 214(c), and 303(r)[28] provide expansive authority for the Commission to do what it deems necessary and not inconsistent with law to protect the public interest. *See FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134,138 (1940) (there is a "recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors"); *NBC v. United States*, 319 U.S. 190, 225 (1943) (Commission must use statutory powers to change regulations which time and changing circumstances reveal no longer serve the public interest).

Section 214(c) of the Communications Act of 1934, as amended, specifies that the Commission "may attach to the issuance of the [section 214] certificate such terms and conditions as in its judgment the public convenience and necessity may require." The Commission, in implementing the Modified Final Judgment in *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 103 S. Ct. 1240 (1983),

[28] 47 U.S.C. §§ 154(i) and (j), 214(c), 303(r).

recognized that under this provision and the Act it could have itself ordered the divestiture of the BOCs from AT&T on the basis of a sufficient record. *AT&T Divestiture*, 96 FCC 2d 18, 44 (1983), *recon.*, 98 FCC 2d 141 (1984), *aff'd on other grounds sub nom. GTE Service Corp. v. FCC*, 782 F.2d 263 (D.C. Cir. 1986).

Moreover, this broad power to conform the industry's obligations to the Commission's newly adopted public interest determinations can involve the divestiture of preexisting assets and regulatory authority, without violating any duty owed to private parties. In *General Telephone Co. v. United States*, 449 F.2d 846 (5th Cir. 1971), the court sustained a Commission decision to force General Telephone to discontinue its provision of cable service. In doing so, it noted that "Where the on-rushing course of events have outpaced the regulatory process, the Commission should be enabled to remedy the problems of undue concentration of control over communications media by retroactive adjustments, provided they are reasonable." 449 F.2d at 863. It also observed that "the property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests." *Id.* at 864. *See also WBEN, Inc. v. United States*, 396 F.2d 601 (2nd Cir.), *cert den.*, 393 U.S. 914 (1968) (loss of pre-sunrise operating authority by rule sustained on basis of adequate record justifying public interest gains.) These and other cases affirming the Commission's broad powers to impose obligations on industry which the Commission has found to be in the public interest specify that such burdens must be based on an adequate record, and the burdens must be rationally related to the public interest benefits anticipated by the Commission. *See, e.g. SEC v. Chenery Corp.*, 332

U.S. 194 (1947); *Florida Cellular Mobile Communications Corp. v. FCC*, 28 F.3d 19 (D.C. Cir. 1994), *cert. den.*, 115 S.Ct. 1357 (1995). Most recently, in *DirecTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997), the court sustained a Commission order compelling an applicant wishing to participate in a spectrum auction to agree to divest existing spectrum licenses. (Divestiture rule not adopted arbitrarily and capriciously, but was reasonably aimed at promoting intra DBS competition).

Accordingly, RCN recommends that the Commission issue a further Notice of Proposed Rulemaking in this docket in which it asks for comments and reply comments on the question whether the RBOCs, and GTE and possibly other ILECs, should be permitted to offer ATC only on a fully divested basis. Interested parties should be asked to provide specific details which in their view justify the action recommended. By issuing a further notice, the Commission will assure that all parties, including the RBOCs and ILECs affected, have adequate notice of the potential scope of the new rules. Just as important, a further notice will provide additional opportunity for those seeking such divestiture to document the need for such steps.

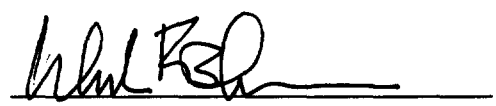
D. Other Issues

Based on its review of the initial comments, RCN continues to believe that it is essential for the Commission to establish national standards for collocation, and national policy concerning *e.g.* availability of dark fiber. It is both appropriate and necessary, of course, to allow state commissions considerable latitude to conform broad national policy to the individual circumstances confronted by state regulatory authorities, but this does not mean that federal authorities should forebear from acting decisively to promote competitive performance.

III. Conclusion

In light of the views expressed by ILECS in the initial comments it is obvious that these incumbents have not, even at this point in the industry's evolution, accepted the basic precepts of fair competition. Instead they evince the continuing determination to use the advantages of incumbency to compete unfairly with new entrants. In such circumstances RCN is forced to conclude that the only viable option to assure implementation of the procompetitive goals of the 1996 Act is full divestiture of those ILEC assets and personnel devoted to the deployment and provision of ATC. This appears to be the most effective way to provide the "optional alternative pathway... for incumbent LECs" mentioned in the NPRM.[29]

Respectfully submitted,

By: 

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October 16, 1998

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[29] NPRM, ¶ 86.

CERTIFICATE OF SERVICE

I, Sharon Gantt, hereby certify that on this 16th day of October, 1998, copies of the foregoing Reply Comments of RCN Telecom Services, Inc. was hand delivered to the parties listed below.

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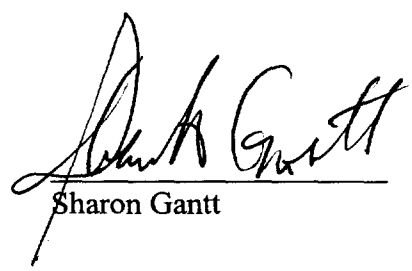

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